Supreme Court, U.S.
FILED

No. 09-1568

IN THE

Supreme Court of the United States

JIANNA MOORE, *et al.*,

Petitioners,

v.

LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Did the Petitioners demonstrate a "compelling reason" to grant this Petition when there is no meaningful difference between the deliberate indifference and professional judgment standards and when no substantial conflict exists?

Did the Petitioners demonstrate a "compelling reason" to grant this Petition when the sixth circuit properly applied the deliberate indifference standard to determine the liability of a county employee who places a child in the care of state-licensed foster parents?

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INTRODUCTION

The Petitioners have not articulated a "compelling" reason for this Court's discretionary review. Sup. Ct. R. 10. At the heart of their request, Petitioners argue that the sixth circuit erred when it failed to adopt the professional judgment standard. But, the deliberate indifference standard is well established and routinely applied in situations involving the liability of state actors who place children in foster care. Circuit courts across the country consistently apply the deliberate-indifference standard in the foster care context to determine whether a state actor is liable under Section 1983. There is nothing novel or controversial about applying this standard.

While Petitioners argue that a substantial conflict between the circuits exists, that conflict is illusory and insubstantial. That is because there is no meaningful distinction between the professional judgment and deliberate indifference standards. Therefore, there cannot be a substantial conflict among the circuit courts and state supreme courts. In fact, the Petitioners point to the Tenth Circuit as posing a circuit conflict. But, that circuit found that as "applied to the foster care setting we doubt there is much difference in the two standards." *Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992). Moreover, the deliberate indifference standard is "flexible" and "context dependent." That standard easily accounts for different factual situations such as the one at bar. Interjecting new terminology for the deliberate indifference standard, as Petitioners advocate, adds nothing but the potential for confusion and disruption to the existing case law.

Finally, the Respondents cannot be held liable under any standard. In the present case, the lower courts properly determined that the Lake County Department of Job and Family Services and its employees complied with all of the state laws and regulations. LCDJFS social workers and supervisors worked diligently to monitor the foster parents and the foster child's well-being. Through several visits to the home, twice weekly telephone conversations with the foster parents, visiting with the child weekly during her visitation with her biological mother and grandmother, LCDJFS employees never observed anything which caused concern for the child's safety or well-being. There is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a risk of serious harm to the child existed.

Petitioners failed to demonstrate that there are "compelling reasons" to grant this Petition. This Court should deny this writ.

STATEMENT OF THE CASE AND FACTS

A. Procedural Background

This action was brought in the United States District Court for the Northern District of Ohio, invoking 42 U.S.C. § 1983 and claiming a violation of substantive due process rights.[1] This case arises out of the foster

[1] The Plaintiffs also alleged state law claims, which the district court remanded to the state court after dismissing with prejudice the federal claims. On March 30, 2009, the Court of (Cont'd)

care of Jianna Moore. While in the custody of State-licensed foster parents Raymond and Lisa Knapp, Jianna suffered injuries consistent with shaken baby syndrome.

The Petitioners sued the Respondents Lake County Department of Job and Family Services ("LCDJFS") and several of its employees, some of which had nothing to do with Jianna's case. Petitioners contended that the unspecified "Defendants" deprived Jianna Moore of her constitutional right to substantive due process by allegedly failing to protect her from the violent acts of third parties and by allegedly failing to adequately investigate, approve, train and monitor Raymond and Lisa Knapp.

Because the record was devoid of support for these claims, the Respondents requested that the court grant summary judgment and the parties fully briefed the issue. Applying the straight-forward law of the sixth circuit and after extensive discovery, the district court determined that "there is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a substantial risk of serious harm to Jianna existed." (Pet. at Apx. "B" 25a.) The district court held that "LCDJFS complied with all of the state laws and regulations in this instance and there is no evidence that

(Cont'd)

Common Pleas, Lake County, Ohio, also found no merit to Plaintiffs' state claims. The state court granted summary judgment in the Defendants' favor. *Jianna Moore, etc., v Lake County Dept. of Job and Family Services et al.*, Case No.: 06CV002928, Lake County. A state appellate court affirmed.

LCDJFS' failure to institute a policy . . . caused any constitutional injury in this case." (Pet. at Apx. "B" 25a.) On October 6, 2008, the court granted summary judgment in favor of all Defendants. *Id.*

The sixth circuit, in an unreported decision, affirmed the district court and refused to adopt the professional judgment standard. (Pet. at Apx. "A" 1a.)

B. Background Facts

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio accurately stated the pertinent facts relevant to the Petitioners' claims. (Pet. at Apx. "A" 1a and Apx. "B" 7a.) For this Court's convenience, the Respondents provide the following.

1. The State of Ohio licensed foster parents Raymond and Lisa Knapp under the requirements dictated exclusively by Ohio law.

In 2003, Raymond and Lisa Knapp submitted an application to the Lake County Department of Job and Family Services (LCDJFS) to serve as foster care providers. In accordance with the requirements of Ohio law and the regulations of the Ohio Department of Job and Family Services, LCDJFS conducted criminal record and background checks, checked personal and employment references, and examined medical evaluations and financial statements of the Knapps. Following their application, the Knapps underwent extensive pre service training, the curriculum of which

is mandated by the Ohio Department of Job and Family Services. Specifically, the Knapps took eleven pre-service training classes totaling 24 hours. The Knapps took the following classes: (1) Becoming an Out of Home Care Provider, Part One; (2) Becoming an Out of Home Care Provider, Part Two; (3) Attachment and Effects of Separation and Placement; (4) Effects of Fostering on the Family; (5) Cultural Issues in Placement; (6) The Dynamics of Abuse and Neglect; (7) The Effects of Abuse and Neglect on Child Development; (8) Behavior Management; (9) Behavior Management, Part Two; (10) The Child's Family; and (11) Protocol for Care.

Consistent with Ohio law, as embodied in Ohio Revised Code Chapter 5103, the Ohio Department of Job and Family Services issued a license to operate a foster home to Raymond and Lisa Knapp. Subsequently, the Knapps were assigned to a LCDFJS social worker and required to undergo a home study. Pursuant to the rules and regulations of the Ohio Department of Job and Family Services, the Knapps were licensed for placement of two children between zero and three years of age.

Subsequently, the Knapps underwent ongoing training administered by LCDJFS and approved by the Ohio Department of Job and Family Services. The Knapps received twenty hours of ongoing training during their first year of licensure, from September 15, 2003 to September 15, 2004. Specifically, on November 1, 2003, Mr. and Mrs. Knapp attended a six-hour training session presented by Ms. Flick at the Geauga County Department of Job and Family Services entitled "Love and Logic Parenting." On November 15,

2003 Mr. and Mrs. Knapp took a two-hour class at LCDJFS entitled "Placement Decisions, Foster Parents as Part of the Team." On November 18, 2003, the Knapps took a two-hour training class entitled "Court Procedures," which was presented by an assistant Lake County Prosecutor. On February 21, 2004, the Knapps attended a six-hour training session, entitled "Diversity Training," at the Geauga County Department of Job and Family Services. On March 24, 2004, Mr. and Mrs. Knapp attended a three-hour class at LCDJFS entitled "Caring for Children Who Have Been Sexually Abused." Finally, on August 22, 2004, the Knapps attended a one-hour video training session entitled "Re-education of Foster Adoptive Kids, Prospect for a Healthy Life." The Knapps' attendance at each of these sessions, and their completion of the mandatory twenty hours of training, was certified by the Ohio Department of Job and Family Services.

Pursuant to the requirements dictated by the Ohio Department of Job and Family Services, LCDJFS conducted routine visits to the Knapps' home. The first visit was conducted in November 2003. Subsequent visits took place on a quarterly basis.

2. **An Ohio Juvenile Court ordered LCDJFS to take emergency temporary custody of Jianna Moore, and LCDFJFS placed Jianna Moore with licensed foster parents, Raymond and Lisa Knapp.**

Petitioner Jianna Moore was born on December 9, 2004. Subsequently, LCDJFS initiated proceedings to obtain emergency temporary custody of Jianna Moore

based upon concerns relating to the mental health, possible drug use and parenting skills of Jianna's biological mother, Plaintiff Danielle Moore, as well as the unsafe condition of Danielle Moore's home. On or about December 12, 2004, the Lake County Juvenile Court granted emergency temporary custody of Jianna Moore to LCDJFS. Prior to the hearing, the substitute care unit of LCDJFS considered available options for placement of Jianna Moore and tentatively approved placement with Raymond and Lisa Knapp. Immediately following the Juvenile Court's grant of temporary custody to LCDJFS, Ms. Whipple took Jianna Moore to the Knapps' home and placed her there. Following placement of Jianna Moore with them, the Knapps executed an Individual Child Care Agreement with LCDJFS, in accordance with the rules and regulations of the Ohio Department of Job and Family Services, whereby Mr. and Mrs. Knapp were permitted to receive and review information regarding, and attend all case plan meetings and semi-annual reviews of, Jianna Moore's case. The case plan and semi-annual review necessarily included information regarding Jianna Moore's biological family.

Throughout the course of Jianna Moore's placement with the Knapps, and under the supervision of LCDJFS supervisor Melanie Hale, Ms. Whipple conducted regular visits to the Knapps' home to monitor and ensure the safety and well-being of Jianna Moore. Moreover, Ms. Whipple personally saw Jianna on a weekly basis, and conducted telephone conversations with the Knapps twice per week. Neither Ms. Whipple nor Ms. Hale ever observed anything to give them any concerns about the safety or well-being of Jianna Moore

or the ability of the Knapps to care for her. Likewise, Jianna's biological mother, Plaintiff Danielle Moore, visited Jianna regularly and never observed any signs of physical abuse or injury.

3. On February 3, 2005, Jianna Moore suffered injuries while in the custody of Raymond and Lisa Knapp.

On February 3, 2005, Jianna Moore suffered injuries that were consistent with "shaken baby syndrome." The Mentor Police Department, as well as LCDJFS, conducted investigations into the injuries sustained by Jianna Moore. Both Detective Petro and Ms. Hale concluded that Jianna Moore's injuries were the result of physical abuse sustained while in the custody of Raymond and Lisa Knapp.

The Petitioners sued the employees of LCDJFS named as Respondents in this action including its present Director, Matthew Battiato, and its former Director, Art Iacofano. Mr. Battiato became the Director of Lake County Department of Job and Family Services on August 7, 2006—long after the events which are the subject matter of Petitioners' Complaint. Respondent Melanie Hale is a Supervisor who performed the investigation on the part of LCDJFS after Jianna Moore sustained her alleged injuries. Erin Whipple is a social worker employed by LCDJFS who was assigned to the Moore case and was responsible for placing Jianna in the Knapps' foster home. Respondent Melissa Flick was involved in the foster parent training for Lisa and Ray Knapp and the placement of Jianna Moore with them. Respondent Teresa Palm is Melanie Hale's supervisor.

Respondent Roberta Barb recently retired from LCDJFS, but while employed there was most recently the Children Services Administrator. Respondent Jamie Lette is presently a supervisor but did not assume that position until August of 2005, and while she previously worked as a social worker at LCDJFS, she had nothing to do with Jianna Moore or her placement. Finally, Respondent Emily Hazel is a caseworker but her first involvement with the Moore family began in March of 2005, after the placement and injuries sustained by Jianna Moore.

Despite having asserted claims against the above-mentioned individual employees of LCDJFS, Petitioners have not identified any facts supporting any legal claims against them.

REASONS FOR DENYING THE PETITION

A. No substantial conflict exists.

Petitioners claim there is a substantial conflict between circuits that have adopted one of two competing standards regarding the culpability of state actors who place foster children.

The conflict is illusory and insubstantial.

Circuit courts across the country consistently and routinely apply the deliberate indifference standard to determining whether a state actor is liable under Section 1983 for allegedly failing to meet obligations to the foster children in its care. The Sixth Circuit, like countless other circuits, holds that the "deliberate indifference"

standard applies in a foster-care context. *See, e.g., J.K. v. Gloria*, 593 F3d 73 (1st Cir. 2010); *Doe v. New York City Dep't of Social Servs.*, 649 F2d 134, 141 (2nd Cir. 1990); *Nicini v. Morra*, 212 F3d 798, 811 (3rd Cir. 2000); *Doe ex rel. Johnson v. South Carolina Dept. of Social Services*, 597 F3d 163 (4th Cir. 2010); *Hernandez ex rel Hernandez*, 380 F3d 872 (5th Cir. 2004); *Lintz v. Skipski*, 25 F3d 304, 305 (6th Cir. 1994); *J.H. ex rel. Higgin v. Johnson*, 346 F3d 788 (7th Cir. 2003); *James ex rel. James v. Friend*, 458 F3d 726 (8th Cir. 2006); *Ray v. Foltz*, 370 F3d 1079 (11th Cir. 2004).

Petitioners point to the Tenth Circuit as the "one federal circuit [that] has expressly adopted the professional judgment standard . . . for evaluating a § 1983 cause of action brought by a foster child." (Petitioner's Br. at 22.) The Petitioners fail to note that the Tenth Circuit did not find much difference between the deliberate indifference and the professional judgment standards. *Lewis v. N.M. Dep't of Human Servs.*, 959 F2d 883, 894 (10th Cir. 1992) ("As applied to the foster care setting we doubt there is much difference in the two standards.")

As the Tenth District itself suggests, the professional judgment standard and deliberate indifference standard is tautology. There simply is no real practical difference but for the words used. Both standards occupy virtually the same point on the "culpability" spectrum —with negligence on one end and intentional wrongdoing on the other. In *Farmer v. Brennan*, 511 U.S. 828 (1994), the Court analyzed the level of culpability deliberate indifference entails. 511 U.S. at 836-47. The Court began the analysis by

asserting that reckless disregard does not fully define the level of culpability required for deliberate indifference. *Id.* at 837. The Court considered what it described as "civil law" recklessness—in which the defendant "should have known" or would be "charged with such knowledge"—and "criminal law" recklessness—which essentially entails ignoring a known risk. *Id.* In concluding that "criminal law" recklessness was the appropriate level of culpability for deliberate indifference, the Court required a plaintiff to establish that the defendant "consciously disregarded" a substantial risk of serious harm. *Id.* at 839. With anything less, constitutional liability cannot be imposed. Unless a defendant deliberately fails to learn of a risk, the level of culpability never exceeds the negligence category—even if it is gross negligence.

Under the professional judgment standard, the same conclusion must be reached. "The substantive component of the due process clause protects against only the most egregious, arbitrary governmental conduct—that is, conduct that can be said to 'shock the conscience.'" The "conflict" that Petitioner describes in his Petition is more theoretical than real. No matter what labels are given, the standards are virtually the same. Within the context of investigating suspected child abuse, if a state official "fails to exercise professional judgment," it means he has disregarded the suspicion of abuse. Even if the official was grossly negligent, constitutional liability will not attach under either the professional judgment or deliberate indifference standard. To "fail to exercise professional judgment," the official needs to do so knowingly. An official must "consciously disregard" a suspicion of

abuse. Despite attempts to draw fine lines between the professional judgment and deliberate indifference standards, there is no meaningful difference between them.

This Court has plainly recognized that the deliberate indifference or shocks the conscious standard for substantive due process claims is flexible in that what shocks the conscience in one context would not in another context. The deliberate indifference standard subsumes the purported professional judgment standard. Here, the standard of what shocks the conscience is viewed in the context of foster care placement. "Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another[.]" *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). Whether a state actor's conduct shocks the conscience depends on the particular factual circumstances, and cannot be determined by reference to an inflexible standard. *Id.*

Circuit courts of appeal understand that determinations of deliberate indifference and questions of what shocks the conscience are adjudicated under this flexible standard. *See, e.g., Phillips v. County of Allegheny*, 515 F3d 224, 241 (3rd Cir. 2008); *see further e.g., Green v. Post*, 574 F3d 1294, 1302 (10th Cir. 2009). The so-called "professional judgment standard" does not add anything to the deliberate indifference standard, which provides the flexibility to accommodate the present context without injecting uncertainty and confusion into the existing law. Creating new terminology would create confusion in the case law

regarding the standard to apply. And, it would create uncertainty in the voluminous case law that has developed around the deliberate indifference standard in the foster-care context and related contexts.

While Petitioners want to change the standard, there is no legitimate, let alone compelling, reason to do so. And, there is no substantial conflict between the Tenth Circuit and other circuit courts or state courts of last resort.

B. Despite Petitioners' request for a negligence-based test, negligence cannot be the standard for a Section 1983 claim.

At the heart of their request, Petitioners advocate a thinly veiled negligence standard in a vain effort to continue to litigate this case. The Petitioners have not articulated a "compelling" reason for this Court's discretionary review. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. This case poses no "compelling reason."

This Court has been clear that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). This Court has expressly held that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v. Williams*, 474 U.S., at 332, 106 S.Ct., at 665, the Court reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down

rules of conduct to regulate liability for injuries that attend living together in society."

Despite the established law or perhaps knowing it, Petitioners try to cut a fine line between negligence and deliberate indifference when they advocate a professional judgment standard. Petitioners' argument is largely based on *Youngberg v. Romeo*, 457 U.S. 307 (1982), which has not generated a substantial conflict during its 28-year history. (Pet. at 30.) Petitioners rely on *Youngberg* to argue that the institutionalization of a mentally handicapped person is tantamount to a foster child in the custody of a third-party foster parent. The differences between these situations are stark, most notably that an institutionalized person is in the custody of the state and the state could extensively monitor that person's confinement 24 hours a day. In the foster care context, that degree of monitoring is impossible. While Petitioners claim that "deliberate indifference" encourages public employees to ignore danger, this claim is unfair and, in this instance, simply untrue. (Pet. at 32.) Here, the Respondents did everything required under Ohio law and Petitioners failed to articulate any reason the Respondents had to believe Jianna would be harmed. Even assuming that there is some substantial difference between the standards—which there is not—the deliberate indifference standard acknowledges the difficult conditions under which state officials operating in the foster care field find themselves, including the inability to constantly monitor, unrealistic caseloads, and inadequate funding.

Ultimately, Petitioners cannot escape that this case is nothing more than a negligence case in which they

cannot even overcome a common-law negligence standard. The facts are undisputed that LCDJFS and its employees complied with all of the state laws and regulations. LCDJFS social workers and supervisors worked diligently to monitor the Knapps and Jianna's well-being. Through several visits to the home, twice weekly telephone conversations with the Knapps, visiting with Jianna weekly during her visitation with her biological mother and grandmother, LCDJFS employees never observed anything which caused concern for Jianna's safety or well-being. There is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a substantial risk of serious harm to Jianna existed. These facts are undisputed.

C. Petitioner's claim is otherwise barred because they have never identified any individual defendant that acted even negligently and have otherwise waived any claim against the public entity.

While arguing that there is a substantial reason for review, Petitioners fail to explain how the individual Respondents acted unlawfully under *any* standard. Petitioners cannot establish that liability exists against an individual. And, Petitioners waived and cannot otherwise establish *Monell* liability against the entity because there is no underlying constitutional violation.

First, Petitioners do not establish that any individual Respondent did anything unlawful. The law is well established that "Each defendant's liability must be assessed individually, based on his or her own actions,"

not the purported actions of others. *Dorsey v. Barber*, 517 F.3d 389 at fn. 4 (6th Cir. 2008). Petitioners' over-generalized claims against everyone they named in their complaint are insufficient. The employees of LCDJFS named as defendants are: Matthew Battiato, LCDJFS' present Director, became Director on August 7, 2006; Art Iacofano, LCDJFS's former Director; Melanie Hale, a Supervisor who performed the investigation on the part of LCDJFS after Jianna was injured; Erin Whipple, a social worker assigned to the Moore case who was responsible for placing Jianna in the Knapps' foster home; Melissa Flick was involved in the foster parent training for Lisa and Raymond Knapp and the placement of Jianna with them; Teresa Palm is Melanie Hale's Supervisor; Roberta Barb recently retired from LCDJFS but was most recently the Children Services Administrator; Jamie Lette became a Supervisor in August 2005 and as a social worker before that, had no connection with the Jianna or her placement; and Emily Hazel, a caseworker whose first involvement with the Moore family began in March 2005, after Jianna was injured. Petitioners do not state how any of these Respondents were deliberately indifferent, failed to exercise professional judgment, or acted negligently toward Jianna Moore. They simply failed to demonstrate that any of these Respondents were liable "individually, based on his or her own actions." *Dorsey*, *supra*. Petitioners' over-generalized allegations are insufficient to establish liability.

Second, Petitioners cannot establish a claim against the entity, the Lake County Department of Job and Family Services, for no fewer than two reasons. Petitioners waived the argument that LCDJFS "caused"

a constitutional violation because they did not raise the argument or challenge the district court's holding in that regard in the intermediate appellate court. Petitioners abandoned any argument that a policy of the County caused Petitioners' injury within the meaning of *Monell*. The Petitioners failed to demonstrate facts that would establish causation. Furthermore, and independent of the lack of a constitutional violation, the district court correctly determined that **no** LCDJFS policy caused Jianna's injury. (Pet. at Apx. "B" 26a.) The LCDJFS cannot be held liable under 42 U.S.C. § 1983 under a theory of respondeat superior unless the Petitioners prove an injury caused by action taken pursuant to official municipal policy. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). In sum, the Petitioners failed to 1) identify the policy, 2) connect the policy to the governmental entity, and 3) show that the particular injury was incurred because of the execution of that policy. *See Garner v. Memphis Police Dep't*, 8 F.3d 358, 363-64 (6th Cir.1993)

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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